No. 8411

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

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In the Matter of

JOSEPH H. GRANDE,

Bankrupt.

JOSEPH H. GRANDE,

Appellant,

vs.

ARIZONA WAX PAPER COMPANY and STATE PRODUCE EXCHANGE,

Appellees.

OPPOSITION TO PETITION FOR REHEARING.

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To the Honorable Curtis D. Wilbur, Francis A. Garrecht, and Clifton Mathews, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

While it is rather difficult to determine from the petition for rehearing in what particulars the decision of your Honorable Court is contrary to the established weight of authority of the Appellate Courts of the United States of America, the petition for rehearing seems to rest generally upon these premises:

1. That the objections to the discharge are insufficient in form.

2. That no evidence was taken before the Special Master other than the introduction of testimony adduced before the Referee, and that such prior testimony was improperly introduced.

3. That the objecting creditors (appellees herein) cannot object to the bankrupt's discharge in view of the fact that the attorney for the objecting creditors represents the trustee in bankruptcy of the bankrupt's estate.

4. That the element of finality does not appertain to a certain turnover order made by the Referee, finding that acts committeed by the bankrupt within the statutory period were fraudulent acts, though the order of the Referee was affirmed by the District Court:

> First, in refusing to disturb it upon procedural grounds;
>
> Second, in determining that a re-examination of the issues raised would lead to no different conclusion.

As indicated in the opinion of your Honorable Court, the appellant herein avoided the orderly presentation of his cause before the District Court, upon the proceedings wherein objection was made by him to the Special Master's report, by the statement that he was "wholly unable to pay for any extended details, either in the transcript or in the brief, and we curtailed the same for that reason."

The proceedings before your Honorable Court, in the form of the appeal, certainly in no manner complied with the rules prescribed for the presentation of any question by a person feeling aggrieved and seeking appellate relief. However, it is apparent that your Honorable Court was

greatly disposed to consider the question by reason of the fugitive statement made by the appellant as to the lack of means for the presentation of the record or brief.

In the instant petition for rehearing, however, the appellant again seems to impose upon the consideration uniformly being shown him, and in no manner points out wherein the decision of your Honorable Court, of which rehearing is sought by the appellant, in any wise is contrary to the established principles recognized by the courts of the United States in Bankruptcy proceedings.

The decision of your Honorable Court is in conformity with the authority of the United States Supreme Court. We have looked in vain in the petition of the appellant herein to find wherein the opinion of your Honorable Court is not in such full conformity, nor does the extent of this petition for rehearing seem to us to be in agreement with the avowed statement of appellant that he was wholly unable to pay for any extended details either in the transcript or the brief.

Under the consideration of what the appellant designates as his first point, the appellant seems to fall into the error of confusing the obligation of a trustee in his duty to account to the creditors, as to whether or not he has properly taken possession of the assets of the bankrupt and properly dealt with them, and the position of the bankrupt in failing to turn over to the trustee his assets. There is no need for citation of authority to show that these are entirely dissimilar situations. The appellant, in support of his argument, cites from the case of *Max Reinboth, et al.*, 16 L. R. A. (N. S.) 341, on page 8 of his petition. That clearly shows that appellant has in mind the obligation of the trustee to the creditors of the

bankrupt. Wherein that concerns the present situation, or wherein that concerns the bankrupt, or wherein the bankrupt would have a right of issue thereon, is beyond us at this stage of the proceeding.

Considering the points attempted to be made by the appellant in his present petition, the classification which we have set forth above of the medley of digest and foot-note information that, apparently, the appellant seeks to set forth in his petition is, of course, an arbitrary one, but we feel more than fairly presents such classification.

We shall, however, in the interest in clarity make brief comment upon the rough classification into which we have divided the mass of argument:

Insufficiency of Evidence.

The appellant complains of the insufficiency of the specifications. It is to be remembered that no objection was raised to the insufficiency of the specifications before the trial court; particularly, we call to the Court's attention the fact that no complaint was made to any insufficiency of verification or filing by the appellant at any time in the lower court.

If any further answer is needed to the aggregation of scattered argument as to the matter of the objections, it is but sufficient to quote the pertinent matter appearing in the *Main* case cited by appellant:

> "The specification is not verified, though required to be by Section 18c of the Bankruptcy Act . . .
>
> "The specification has not been assailed by the bankrupt, and it may be that the failure to verify the same has thereby been waived."
>
> *In Re Main,* 205 Fed. Rep. 421-422.

Consideration as to Matter of Introduction of Evidence Previously Taken.

The appellant also devotes much time to the introduction of the evidence previously had and taken during the course of the bankruptcy proceeding, and would lead us to believe that such evidence was improperly introduced and that the Special Master considered evidence, adduced in prior proceedings by a Referee previously acting therein, without a proper foundation for the introduction of such evidence. The appellant, however, has not brought up any record which would substantiate that position or in any wise show that the evidence adduced was improperly considered by the Special Master. We believe that a fair statement would be that a Special Master cannot and should not take cognizance of records not introduced before him as a Special Master who is sitting in a special advisory capacity to the Court, but, where any prior testimony is properly introduced, we cannot see why it should not be admissible.

Such objection as the appellant has pointed out relative to the introduction of testimony is not only raised for the first time upon this petition for rehearing upon his appeal, but also refers to instances where a Special Master, without the proper introduction of the prior proceedings had before the Referee, takes cognizance of such testimony. Wherein it is improper to consider prior testimony of the bankrupt, which is being properly introduced in a pending proceeding, has not been pointed out to us, and, being that the testimony referred to by the Special Master is the testimony of the bankrupt himself, it would be, indeed, difficult to think of an ingenious theory that a bankrupt's prior declarations and testimony could not be introduced into evidence against him.

Right of Objecting Creditors to Employ Counsel.

Much time is spent in some sort of a protest that an attorney who represents a trustee cannot represent an objecting creditor to a discharge. No authority is cited in support of this startling proposition. The only thing that would approach the semblance of authority are cases having to do with the unauthorized appearance of a trustee in opposition to a bankrupt's discharge; wherein this may have anything to do with the appearance of a creditor, we have difficulty in understanding; wherein it is proper for a bankrupt to state who his creditor shall employ as counsel, we likewise cannot understand; it must be founded upon the theory that the bankruptcy proceeding is a proceeding wholly under the control of a bankrupt and that his creditors are not concerned with it and have no rights therein. We think the bankruptcy proceeding is a proceeding for the benefit of the bankrupt, in that it absolves him of all further liability where he has lived up to the law under which he would be entitled to such remedial effect.

Recitals in Turnover Order Final.

Counsel for appellant seems to have difficulty in realizing that he has had his day in Court in the proceedings for a turnover order and that these proceedings resulted in a final judgment of a court of competent jurisdiction, which found appellant guilty of acts which are expressly prohibited by the Bankruptcy Act and which bar a discharge of a bankrupt who has committed these acts, and we have, we believe, shown heretofore that the judgment of the Referee upon the turnover proceedings was and is a final judgment (Appellees' Brief, pp. 16-19) and that,

even without any act on the part of any objecting creditor, the presence of that judgment was and is sufficient to bar a discharge upon the theory of judicial notice and the obligation of any Court not to permit a mockery of its own judgments, orders and procedings. (Appellees' Brief, pp. 24-25.)

It is more than late in the day for the appellant to come in upon a petition of this sort and indulge in the type of sophistry with which the petition abounds. For instance, on page 14, a statement is made:

> "The charge of concealment is defective in that it is not alleged that the property was knowingly and fraudulently concealed from the trustee after Grande became a bankrupt."

We know of no such rule of law. Many of the things barring a discharge under Section 14 of the Bankruptcy Act are matters and things committed before the actual bankruptcy takes place, so the very essence of the things recited in the turnover order are that they are matters committed within the statutory period antedating bankruptcy.

In our brief herein filed, we have submitted to the Court the pertinent portions of the decision in *Arkansas v. Arkansas Natural Gas Corp.* (286 U. S. 269, 272); also a portion of the decision by Chief Justice Taft in *Oriel v. Russell* (278 U. S. 358)—(Appellees' Brief, pp. 16, 17 and 18).

Also we have cited authority showing that the prior determination of concealment is conclusive in all subsequent proceedings. (Appellees' Brief, pp. 21, 22 and 23.)

We have likewise shown that it is the particularly uniform rule adhered to by Your Honorable Court that the

findings of a Special Master or Referee approved by the District Court are conclusive of the question of fact and will not be disturbed except in cases of gross error. (Appellees' Brief, pp. 26 and 27.)

To extend this authority and to further develop the argument would serve no useful purpose and none of the arguments attempted by the appellant herein in anywise permits the disturbance of the salutary principles we have set forth, announced both by the United States Supreme Court and Your Honorable Court.

One of the strongest answers to the position of the appellant is the expression of the Honorable William P. James, District Judge, in his opinion of February 27, 1935:

> "I am of the view: (1) That the showing as to the mistake of counsel is not sufficient to justify the making of the order here sought; (2) Assuming that the omission to act was excusable, the facts as presented touching the propriety of the order made by the referee are insufficient to support a substantial claim for error." [Tr. of Rec. p. 17.]

The consideration of Your Honorable Court in determining this appeal has been as laborious and extensive as the presentation of our own cause and such volume of labor was due greatly to the unhappy state of the record submitted by the appellant, and we have been very careful not to permit any tinge of feeling in the submission to the Court of a case where so grave an issue is involved as the denial of a discharge in bankruptcy. More than ever, therefore, we feel disturbed that the appellant has seen fit to predicate his petition for rehearing upon at least several unfortunate misstatements, which we hope

were due solely to confusion. Thus, on page 27, under the paragraph headed "VI", the appellant speaks of form 56 (meaning, of course, the official forms prescribed by the Supreme Court in Bankruptcy) and indicates that form 56 is a form prescribing a certificate of compliance to be issued by a Referee in Bankruptcy. Official form No. 56 deals solely with certification of a question by a Referee to the Judge. There is nothing in the Bankruptcy Act or in the rules of the United States Supreme Court requiring the archaic and meaningless form of the certificate of compliance. That it is properly characterized by us can best be illustrated by the present case. Why the appellant wishes us to believe that a certificate prescribed only by local rule of the District Court is a certificate prescribed by the United States Supreme Court is difficult to understand.

The appellant, in his petition for rehearing, most seriously attacks the proceeding by particularly making the inaccurate statement that no testimony was taken before the Special Master. Thus, on pages 25 and 26 in his petition, the appellant says:

> "Not a solitary word of concealment or any fact to establish concealment either fraudulently or otherwise was offered in evidence at the trial before the Special Master and the record clearly shows that all of the evidence that was offered before the Master was the Four Volumes of testimony taken before Referee Turnbull during the prior hearing of the bankruptcy proceedings. No evidence of any kind or character was offered before the Special Master other than what was offered before Referee Turnbull during the progress of the bankruptcy hearing. The Special Master simply took the records and files in

> the case offered in evidence by Attorney Shipman, over the objection of bankrupt's counsel, accepted the same in evidence and then based his findings of fact and conclusions of law upon the hearing that was had before Referee Turnbull."

That such was not the case, it is but sufficient to refer to the Transcript of Record herein and call the Court's attention to the Report of Referee as Special Master, appearing on pages 32 to 44 of the Record. Thus, in the first paragraph on page 33, the Special Master says:

> "Evidence, both oral and documentary, was presented and submitted to the Special Master; . . ."

Again, on page 39, having to do with the proceedings affecting the Arizona Wax Paper Company, the Special Master, in his Findings of Fact, states as follows:

> "At the time of the trial of the objections presented by said objecting creditor, Arizona Wax Paper Company, the bankrupt denied that said objecting creditor was a creditor of the bankrupt, claiming that said Arizona Wax Paper Company, a co-partnership, was a creditor of persons other than the bankrupt. The Special Master finds, however, that the testimony by the bankrupt is untrue; that the bankrupt, prior to bankruptcy, evidenced the debt by a promissory note, and also acknowledged the indebtedness in writing; declaring it to be his debt in a letter written to one of the members of said co-partnership. . . ."

Also we refer to page 47 of the transcript, where appellant in his exceptions says (par. 3 on said page):

> "Evidence both oral and documentary was presented and submitted to the Special Master; the evidence being closed the cause was submitted to the Special Master for his report, findings and determination."

Conclusion.

We do not know whether our appearance upon this petition has lightened the labors of the Court; in appearing, we are moved solely by that desire. The excerpts from digests and footnotes so copiously interspersed in appellant's petition does not in anywise appertain to the issues. The appellant, throughout the proceedings, disregards the necessary recognition of a final judgment upon the issues heretofore had. We have in our reply brief dealt with the matters having to do with the finality of the turnover order and its effect upon the bankrupt's discharge and also its consequent effect as judicial notice to prevent any action by the Court that would, in effect, nullify the prior judgment. It is needless, therefore, to cover those matters again. No reason appears why the proceedings heretofore had should in anywise be disturbed. The appellant herein has had his day in court and, instead of predicating any appeal for any remedy upon any realization of the impropriety of prior acts, his present petition is based upon a premise of introducing greater confusion and rests upon misstatements.

Respectfully submitted,

BENJAMIN W. SHIPMAN,

Attorney for Appellees.